STATE OF NEW JERSEY
OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF LAW & PUBLIC SAFETY
DOCKET NO.EJ07WB-63863
EEOC CHARGE NO. 17E-2013-00410

F.P. and the Director of the NJ Division on Civil Rights, Complainants, v. Kearny Auto Spa, and Manager, Carlos Santiago, Individually, Respondents.	)	Administrative Action **FINDING OF PROBABLE CAUSE**

On May 15, 2013, F.P. (Complainant)[1] filed a complaint with the New Jersey Division on Civil Rights (DCR) alleging that her former employer, Kearny Auto Spa, and its Manager, Carlos Santiago, (Respondents), subjected her to hostile work environment sexual harassment in violation of the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49. On February 25, 2014, she amended her complaint to include an allegation of retaliation. Respondents denied the allegations of discrimination and retaliation in their entirety. DCR's ensuing investigation found as follows.

Kearny Auto Spa, located at 946 Passaic Avene in Kearny, describes itself as offering a "wide variety of automotive services, ranging from . . . high end car wash system, to . . . 4 high tech lube service stations." Carlos Santiago is a manager.

On July 17, 2012, Respondents hired Complainant to work as an auto detailer. Her duties included waxing vehicles, hand drying vehicles, and cleaning car interiors. She reported to Santiago and a company official whom she described as a general or regional manager named

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[1] The DCR Director hereby intervenes as a complainant pursuant to N.J.S.A. 13:4-2.2(e). However, for purposes of this finding, "Complainant" will refer only to F.P.

Alex.[2]

Complainant, who is lesbian and the only female auto detailer at the location during the relevant time period, alleged that she was continuously subjected to unwelcome harassing comments by Santiago, Alex, and co-employees Sebastian Hernandez and Richard (last name unknown). She alleged that on November 29, 2012, Santiago said, "Turn around and let me look at your ass." She alleged that on more than one occasion, Santiago said, "You're not good enough. Men do a better job." She alleged that on March 8, 9, and April 23, 20, and May 8, 9, 2013, Hernandez asked, "When are you going to take me home with you?" She alleges that on April 20 and May 4, 2013, Richard asked, "When are you going to let me have sex with you?" She alleged that when her partner visited her at work, Santiago and Alex made inappropriate remarks about the women's sexual orientation, such as Santiago saying that he would "take care" of Complainant's partner. She alleged that Alex repeatedly asked how she and her partner had sex. She alleged that when her female friends brought their cars into be washed, both men would ask her, "Oh, are you gonna go home with her tonight too?" She alleged that in June 2103, she told Santiago that her hands were irritated from the cleaning chemicals and he replied, "What, did you stick your finger in the wrong hole?" Complainant alleged that after each unwelcome sexual innuendo and demeaning remark, she complained to Santiago but no remedial action was ever taken and the harassment continued.

Complainant alleged that between March and June 2013, she was the only employee whose work hours were reduced, and that in June 2013, her assignment was changed from detailing cars to wiping cars down. Complainant alleged that on several occasions, she would arrive to work at 8:00 a.m., as scheduled, but would be prohibited from signing in until 10:00 a.m. She alleged that although she was not on the clock, she was directed to remain on the property by Santiago or Alex. She alleged that she was the only employee who was regularly sent home despite being scheduled

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[2] Respondents did not provide the last name for Alex and certain other employees identified during the investigation.

to work.

On June 19, 2013, Respondents fired Complainant for leaving work early. Complainant denied leaving work early. She stated that a similarly-situated male employee, R.L., left early but was not discharged.

Respondents denied discriminating against Complainant, and wrote in part:

> This complaint is a complete fabrication made up by a disgruntled employee. This was an employee who consistently showed up to work late and left work early. She was warned many times before her discharge and her being let go had absolutely nothing to do with her being a female. As a matter of fact it is quite the opposite. She was given was given 2nd, 3rd, 4th, and 5th chances simply because she is a woman. We try to hire as many women as possible as our experience has been that women are superior to men in our particular type of customer service, especially with female customers. . . . So whenever a woman applies for the particular job in question we hire almost without exception. We also will tend to give as many hours as possible to our female employees as they make up the great minority of our work force. If anything, the discrimination might be against a male employee who loses hours to a female employee simply because she is a female.

See Respondents' Responses to Information Requests, undated. Respondents noted that they did not have a "specific person or department to handle [sexual harassment] complaints." Ibid.

Respondents stated that according to their time records, Complainant was not working on March 8, April 23, May 8, or May 9, 2013, i.e., dates on which she alleges some of the unwanted comments occurred.

Respondents did not provide DCR with any records of Complainant leaving work early or provide specific dates for such occurrences. Respondents denied the claim that R.L. left work early. DCR asked Respondents for personnel records of Complainant, R.L., and other similarly-situated employees, so that DCR could examine Complainant's allegations that she was treated less favorably than her male counterparts (e.g., her claim that she was the only employee whose work hours were reduced). Respondents did not produce the requested information.

DCR asked Respondents to support their assertion that Complainant "was warned many times before her discharge" about tardiness and leaving early. Respondents replied, in part, "We don't have dates, persons present or detailed info on the verbal warnings before her Discharge."

See Email from J. Liebhoff to DCR, Jan. 9, 2015, 3:16 p.m.

Two witnesses supported Complainant's version of events. J.R., a former co-worker, told DCR that he heard Santiago state, "Look at her ass," and, "I would fuck the shit out of her." J.R. also stated that he overheard Santiago tell Complainant, "Since you act like a man, I'm going to treat you like a man." He said that Complainant told him that a male co-worker attempted to grab her and kiss her while she was in the supply room. J.R. stated, "Sometimes Santiago or Alex would send her home after two hours of working, or direct her to come in, sit there for two hours without clocking in, and then send her home." He noted that Complainant was the only employee treated that way. He also noted that Santiago gave Complainant more tasks to perform than male employees.

C.G., a former co-worker, told DCR, "They messed with [F.P.] big time." C.G. stated, "One day I was on the register and one of the guys, Rolando, detailer, said [F.P.] is pretty but [F.P.] is gay and [Santiago] said she needs a real man to show her the ropes." C.G. stated:

> I think it was different with [F.P.] because she blew off their advances and she had a problem with her knee and she would bring doctor's notes that said she can't do heavy work and [Santiago] got mad saying, "Why would you try to take a man's job if you're not willing to work like one." He said, "Why would you dress like a guy and not work like one." . . . I know for a fact that Alex said something about [F.P.] being a lesbian, something to do with how can you have a daughter and then become a daughter it makes no sense. One day [F.P.] brought her daughter and girlfriend to work to wash her car. When they left he said that. Something like how you gonna choose a girl when you had a guy. No, he said, "How you gonna become a straight up lesbian when you had a guy?"

C.G. stated that management would have employees wait an hour or two before punching in when it was not busy but "[t]hey seemed to do it a lot more to [F.P.]." C.G. stated:

> The clock issue was for everybody but I left they were really messing with her because one day she called and asked if it's busy and I said yea, [F.P.] asked if [Santiago] would call her in, I called [Santiago] . . . he told her to come in and when she came in [Santiago] told her to wait because he doesn't know if he needs her so she waited for almost 2 hours and then sent her home, they never did that to anybody else, never sent anyone else home like come in and then send them home.

Concerns were raised about the accuracy of the time records on which Respondents rely. C.G. and J.R. stated that Respondents did not use a time clock or punch-in system. Rather, the cashier was in charge of keeping track of employees' times. It appears that only the cashiers and managers have passwords to access the computer system and enter time. C.G. told DCR that the cashier who works on Sundays, Elize (last name unknown), would improperly change some employees' hours or transactions in the system. C.G. stated that when she reported those improprieties to Respondents, no corrective action was taken. DCR asked Respondents why some of the time records were marked, "Edited." Respondents replied, "We don't keep records of the specific reason why an edit is/was made. Also if their [sic] was a change in the department they were working in for that day. (Example from Carwash worker to Detail worker)." See Email from J. Liebhoff to DCR, supra, ¶11. When asked to describe Complainant's work schedule, Respondent replied, "No longer have this information. Schedules are made week to week and we don't keep that paperwork after the current week is completed." Id. at ¶10. Likewise, when asked to provide work schedules for certain comparators, Respondent replied, "No Longer have this information." Id. at ¶9.

Analysis

The LAD makes it illegal to discharge or otherwise discriminate against an employee in the "terms, conditions or privileges of employment" based on certain characteristics inlcuding gender and sexual orientation. N.J.S.A. 10:5-12(a). Hostile work environment sexual harassment is a form of gender discrimination. See Lehmann v. Toys 'R' Us, Inc., 132 N.J. 587, 607 (1993). In such cases, the critical issue is whether a reasonable woman would find the conduct to be severe or pervasive enough to alter the conditions of employment and create an intimidating, hostile, or offensive working environment. Id. at 603. In reaching those determinations, courts focus on the conduct itself, not its effect upon the plaintiff or the workplace. Cutler v. Dorn, 196 N.J. 419, 430-31 (2008). Neither a plaintiff's subjective response to the harassment, nor the defendant's subjective

intent, is controlling as to whether a hostile work environment claim is viable. Ibid.

At the conclusion of an investigation, the Director is required to determine whether "probable cause exists to credit the allegations of the verified complaint." N.J.A.C. 13:4-10.2. "Probable cause" for purposes of this analysis means a "reasonable ground of suspicion supported by facts and circumstances strong enough in themselves to warrant a cautious person in the belief that the [LAD] has been violated." Ibid. A finding of probable cause is not an adjudication on the merits, but merely an initial "culling-out process" whereby the DCR makes a threshold determination of "whether the matter should be brought to a halt or proceed to the next step on the road to an adjudication on the merits." Frank v. Ivy Club, 228 N.J. Super. 40, 56 (App. Div. 1988), rev'd on other grounds, 120 N.J. 73 (1990), cert. den., 111 S.Ct. 799. Thus, the "quantum of evidence required to establish probable cause is less than that required by a complainant in order to prevail on the merits." Ibid.

Here, witnesses supported the allegations of a hostile workplace where male supervisors and co-workers freely made lewd and offensive sexually-charged remarks based on Complainant's gender and sexual orientation, and where Complainant was made to stay on the premises but not allowed to clock in, more so than male employees, and then sent home. Thus, the Director is satisfied that there is a "reasonable ground of suspicion" to support a finding of probable cause as to the allegations of hostile work environment based on gender and sexual orientation. N.J.A.C. 13:4-10.2.

Complainant also alleged that she was fired because of her gender and/or in retaliation for complaining to Santiago about his and others' offensive remarks. Respondents initially asserted that Complainant was fired because she "consistently showed up to work late and left work early." See Responses to Requests for Information, undated. During the course of the investigation, Respondents appeared to shift their reason for the firing. See Email from J. Liebhoff to DCR, supra, ¶5 ("She was Discharged do [sic] to the lack of skill to do the job she applied for."). To

date, Respondents have not provided persuasive evidence to support either of those assertions.

Respondents denied ever receiving a complaint of sexual harassment from Complainant or anyone else, and noted that they have "[n]o specific policy" and no "specific person or department to handle complaints of this nature." As a general matter, an employer cannot insulate itself against workplace discrimination claims by simply refusing to implement a system to accept and investigate such complaints. Indeed, the absence of such a system is fraught with risks, i.e., harm to the employees and potential liability for the employer. See e.g., Lehmann, supra, 132 N.J. at 621-22 (noting that the "foreseeability" that female employees will be sexually harassed in the workplace means that an employer's failure to "have in place well-publicized and enforced anti-harassment policies, effective formal and informal complaint structures, training, and/or monitoring mechanisms" could amount to "strong evidence of an employer's negligence").

In view of the above, the Director is satisfied at this preliminary stage of the process that the circumstances of this case support a "reasonable ground of suspicion" to warrant a cautious person in the belief that the matter should "proceed to the next step on the road to an adjudication on the merits" based on Complainant's allegations of gender and sexual orientation discrimination and retaliation. Frank, supra, 228 N.J. Super. at 56.[3]

DATE: 1-20-15

Craig Sashihara, Director
NJ DIVISION ON CIVIL RIGHTS

[3] The allegations that Respondents are violating wage and hour laws can be explored during the OAL hearing. DCR takes no position with regard to same because such issues, while troubling, are beyond this agency's jurisdiction.